F. M. S. REPORTS.

[ORIGINAL CIVIL JURISDICTION]
HOWES, J.
June 2, 1934.

IN THE MATTER OF THE COMPANIES ENACTMENT, 1917

and

IN THE MATTER OF HUEY YET TIN DREDGING LIMITED.

[PERAK CIVIL APPLICATION No. 142 of 1930]
[COMPANIES WINDING-UP No. 1 of 1930]

The Companies Enactment, 1917, section 179, sub-section (iii)—Liquidation of Company and reference to Court by liquidator—Equitable charge against Siamese "pratanabats"—Enforcement of in Courts of the Federated Malay States —Lex situs.

The Courts of the Federated Malay States will respect the provisions of section 47 of the Siam Mining Act, 1919, which provides *inter alia* that:—

"No mortgage or charge of any kind on a paratanabat shall be valid unless previously sanctioned by the Royal Department of Mines."

Accordingly, a creditor company, which accepted a debenture from a debtor company whereby the latter agreed to charge mining land held under Siamese pratanabats, when no permission had been obtained from the Royal Department of Mines under section 47 of the Siam Mining Act, 1919, will not be entitled to enforce in or through the Courts of the Federated Malay States an equitable charge against such pratanabats.

Summons in Chambers before Howes, J.

H. Huntsman and *H. R. Rix* for the Official Receiver.

J. H. B. Will for the creditor.

Cur. Ad. Vult.

The facts appear sufficiently from the judgment of Howes, J.

HOWES, J.—In this application, the Official Receiver, Federated Malay States, applies for an order giving the directions of the Court under Section 179 (iii) of the Companies Enactment, 1917, on the following matters:—

(a) Upon the liquidation of the above Company was Bun Tin Lum Company, Limited, entitled to enforce in or through the Courts of the Federated Malay States an equitable charge against the Pratanabats of the above Company or the rights and benefits thereof?

(b) Should the proceeds of sale of the property of the above company including the said Pratanabats be applied towards satisfaction of the claim of Thomas James McGregor under the Debenture of the 22nd day of June, 1928, or be applied in satisfaction of the claims of the creditors generally?

The facts are set out in the affidavit of Mr. J. D. M. Smith, the Official Receiver sworn the 21st April, 1934. Shortly, they are as follows:—

Huey Yet Tin Dredging Ltd, (the debtor-company) went into liquidation in 1930. One of the creditors of the debtor-company was Bun Tin Lum Co., Ltd.

On the 22nd June, 1928, the debtor-company in consideration of $109,556/- gave a debenture by way of first charge on all its property and assets, and by an agreement made on the same day the debtor-company agreed upon demand by the lender, (i.e. the Bun Tin Lum Co., Ltd.), to charge the mining lands mentioned in the first schedule by way of registered charge in favour of the lender.

On the 11th December, 1931, Bun Tin Lum Co., Ltd., assigned to Mr. T. J. McGregor all debts due to it by the Official Receiver and Liquidator of the debtor-company, and the full benefit of its interests and title to the same.

It is agreed that Mr. McGregor stands in the shoes of Bun Tin Lum Ltd.

Mr. McGregor claims to be a creditor for $194,723.31, and also to be a secured creditor for a sum of $121,406.30 of this amount by virtue of the debenture. This sum includes interest payable under the debenture down to 26th August, 1930.

The debtor-company possessed certain 'Pratanabats,' or mining rights in Siam which Mr. McGregor claims to have been included in the charge. According to section 3 (v) of the Siam Mining Act, 1919,

> "Pratanabat means an agreement which the Royal Department of Mines shall have made with any person in accordance with this Act conferring on the holder the right to carry on mining work within the area specified in the document."

Section 45 of the same Act deals with the transfer, by the holder, of a pratanabat to others and lays down the procedure to be followed.

Section 47 is the all-important section in this matter, and reads—

> "No mortgage or charge of any kind on a pratanabat shall be valid unless previously sanctioned by the Royal Department of Mines. No holder shall be allowed to use his pratanabat in whole or partial liquidation of a debt, nor shall a pratanabat be attachable in respect of such debt."

Section 51 reads:—

> "A pratanabat does not convey to the holder any rights of ownership in the land comprised in such pratanabat. The rights conferred on the holder are to be only as follows:—
>
> (i) The holder has the right to mine, treat and sell such mineral or

minerals as are specified in the Pratanabat. Should the holder wish to mine any mineral not so specified he shall first obtain special permission to do so from the Minister.

(ii) The holder may take such vacant land within his Mining Area for the purpose of erecting buildings and planting such vegetables and keeping such animals as may be neccessary for the work of the mines and the support of his workmen, after having obtained permission in writing at the District Mines Office."

It is somewhat difficult to say exactly to what, in English Law, a pratanabat corresponds. It does not convey any rights of ownership in the land comprised in the Pratanabat, but gives the holder the right to mine, treat and sell minerals specified therein. This appears to me, in English law, to amount to a *profit à prendre* in gross,— and, as such, is an interest in land.

The first question is: Did the debenture and the agreement each dated the 22nd June, 1928, create over the pratanabats, an equitable charge enforceable in the Courts of the Federated Malay States?

It is agreed that at the time the debenture was issued, sanction to create the charge on the pratanabats had not been obtained from the Royal Department of Mines, so that, having regard to section 47 of the Siam Mining Act, according to the Siamese law the charge was invalid; the previous sanction being a condition precedent to the validity of the charge.

The next question is:

Can this Court, in the exercise of its equitable jurisdiction, hold that, despite the invalidity of the charge in law, in equity the charge is valid?

It is first necessary to consider the Siamese law on the point. The restraint on mortgages or charges without sanction in section 47 of the Siamese Mining Act, 1919, is statutory, and as such, is entitled to the greatest respect. It is the *lex loci rei sitae*, and states that no charge of any kind on a pratanabat shall be valid unless previously sanctioned by the Royal Department of Mines. In other words, it forbids the creation of charges on pratanabats without sanction.

Admittedly, this is not a complete prohibition; but for some reason into which I am not called upon to inquire, the Siamese Government has thought fit to ordain that prior sanction of the Department of Mines is essential to the validity of a charge, and unless and until that sanction is given, clearly, the charge is invalid.

The case of *Kent Coast Railway Co.*, v. *London, Chatham, and Dover Railway Co.*, (1868) 3 Ch. App. 656, is somewhat analogous, Here, there was a statutory provision that the power to grant or accept a lease should not arise till the Board of Trade had certified that it had been proved to their satisfaction that half the capital of the leasing company had been raised and applied for the purposes of these Acts. It was held that no lease or binding agreement for a lease could be made before the certificate had been obtained. The certificate in this case, was a condition precedent imposed by statute: in the same manner as the sanction of the Department of Mines was a condition precedent to the creation of a charge on a pratanabat.

In the course of his judgment Page Wood, L.J. stated:—

> "We think it was not competent for the companies to enter into any lease, or binding agreement for a lease, until the certificate of the Board of Trade had been obtained.....
> The proper course would have been for the directors first to obtain the certificate, they then might have submitted heads of arrangement to a meeting, and then have executed a lease; but nothing of the kind has been done. The two companies have approved of something which, at the time of such approval, could not be, and was not, a lease or binding agreement for a lease, for the power of leasing had not arisen owing to the absence of the certificate of the Board of Trade.....
> It is clear that before 1864, at all events, no valid lease existed."

In the present case, the debtor-company gave a charge on all its property, intending to include the pratanabats before sanction had been given. To paraphrase the above judgment, the Directors purported to create something which, at the time of granting the debenture, could not be, and was not, a charge on the pratanabats; for the power to charge them had not arisen, owing to the absence of the sanction of the Department of Mines.

For Mr. McGregor, Mr. Will has argued that this debenture created an equitable security, and that these Courts should give effect to an equitable charge even where it is over land in a foreign state, if the charge can be made effective by an action *in personam*, and if the order of the Court will not interefere with foreign law: that a debenture does not create more than a personal right, as distinct from a real right, and can be enforced by an action *in personam*.

He suggests that the Court could have ordered the debtor-company to transfer the pratanabat to the creditor-company, and at the same time have ordered the creditor-company to execute a trust deed stating that they held as trustee for the debtor-company until the money due on the debenture was paid off. This he says, could

have been done without calling on the debtor-company to give a charge which, without sanction, was contrary to the laws of Siam, and this would not have been a subterfuge or evasion of the law of Siam.

I have referred to the numerous cases quoted by counsel, and the law is summarised in the judgment of the House of Lords in *Brown* v. *Gregson*, (1920) A.C. 860, in which Viscount Finlay at page 875 stated:—

> "It is quite true that the Courts in Scotland or in England may, with regard to persons within their jurisdiction, make orders in certain cases with reference to land in a foreign country. A contract with regard to land bought may be enforced here *in personam* so long as it is not contrary to the *lex situs* which, with regard to real property must be the governing law. The law on this point was laid down by Lord Cottenham, L.C., in the case of *Ex Parte Pollard*, (1840), Mont. & Ch. 239, 250, 251. It is true that in this country contracts for sale, or (whether expressed or implied) for charging lands, are in certain cases made by the Courts of Equity to operate *in rem:* but in contracts respecting lands in countries not within the jurisdiction of these Courts they can only be enforced by proceedings *in personam*, which Courts of Equity here are constantly in the habit of doing: not thereby in any respect interfering with the *lex loci rei sitae*. If indeed the law of the country where the land is situate should not permit or not enable the defendant to do what the Court might otherwise think it right to decree, it would be useless and unjust to direct him to do the act; but when there is no such impediment the Courts of this country, in the exercise of their jurisdiction over contracts made here, or in administering equities between parties residing here, act upon their own rules, and are not influenced by any consideration of what the effect of such contracts might be in the country where the lands are situate, or of the manner in which the Courts of such countries might deal with such equities. As the law of the Argentine forbids all trusts of land there, it appears to me that it should be contrary to the comity of nations for a foreign Court to endeavour by its jurisdiction *in personam* to make the land of the Republic subject to a system of trusts which its law prohibits."

In the present case, we have the law of Siam forbidding charges on pratanabats, without sanction.

Lord Moulton, in *Brown* v. *Gregson (supra)* in his judgment, after dealing with the facts, stated at page 886:—

> "In the first place, it is evident that it is impossible for the appellants to surrender their shares of the Argentine land to the uses of the will. By the law of Argentine this is impossible. The way in which the judges of the Court of Session proposed to effect it is by the children granting a conveyance of the land in favour of the trustee, the latter granting *unico contextu* the appropriate declaration of trust. To my mind such a proceeding would be an evasion of the Argentine law, and I cannot think that it is permissible to our Courts to lend themselves to a sham which would in reality place the Argentine lands in the hands of a nominal owner whose true position was only that of a trustee. It must be remembered that the refusal of Argentina to permit lands to be held by a trustee is based on grounds of public policy. They insist that the person in whose name the lands stand shall be the true owner. Our ideas of land tenure may not agree with theirs, but we are bound to accept and act loyally up to the laws as to land which obtain there."

Had the debtor-company obtained the sanction of the Department of Mines before issuing the debenture, there can be no doubt that this would be a valid equitable security according to the English law, and Mr. McGregor, the debenture holder, would rank as a secured creditor in respect of the property in Siam. The law as stated in *Palmer's* Company Law on this point was approved by Swinfen Eady, J., in the case of *British South Africa Company* v. *De Beers Consolidated Mines Ltd.*, (1910), 1 Ch. 354, at page 387. In the 14th Edition of that work it appears at page 287 as follows:—

> "Even without complying with the formalities required by the local law in relation to mortgages or transfers, it is still competent to a company to create an effective charge on property belonging to it in a foreign country; for the Court, sitting in chancery in virtue of its jurisdiction *in personam*, enforces equities in regard to foreign land where the mortgagor company is within the jurisdiction and in determining whether there is an equity the Court regards English, not foreign, law, and if according to English law there is an equity, e.g., if for valuable consideration a company agrees to give a charge on foreign property, the Court will enforce it, although the equity may be one not recognized by the *lex loci rei sitae*."

In the present case can it be said that any rights or equities arose over the *pratanabats*? Clearly in Siam the charge was invalid. As

stated by Kennedy, L.J., in *Bank of Africa Ltd.* v. *Cohen*, (1909) 78 L.J. Ch. 767, at page 779:—

> "Now it is well-settled general rule of private international law, as applied alike in this country and in the United States, that in regard to immovable property the *lex situs*, or, as it is sometimes styled, the *lex rei sitae* prevails as regards all rights, interests, and titles in and to such property. An English Court will not assume jurisdiction to deal with either the property in or the possession of real estate which forms part of a foreign country.... and where, as we find to be the case here, the *lex situs* declares an instrument of suretyship intended to operate upon real estate to be void because of an incapacity of one of the parties, except upon certain conditions which have not been fulfilled, to bind herself by such an instrument, it is the duty of this forum to respect the *lex situs* and to treat the instrument as of no validity against that party..... There have been, no doubt, cases where our Courts have by their judgments indirectly affected real property out of the jurisdiction, where the parties to the action have been within the jurisdiction as the parties to this action are. Acting *in personam* and not *in rem*—'upon the conscience,' in the language of one of these judgments, 'of the person living here'—*Cranstown (Lord)* v. *Johnston*—the Court has given effect to contractual or equitable rights, and so indirectly affected, as I have said, immovable property abroad.
>
> Several of these cases, such, for example, as *Pollard, Ex parte*, were cited to us in argument, and most, if not all, of them are referred to and classified in Mr. Foote's work, pp. 186, 192. But in none of these cases have our Courts given effect to a contractual or equitable right *in personam* which the *lex rei sitae* would treat as incapable of creation. No case has been cited to us, and upon principle, I should be surprised if any could be found, in which case this jurisdiction *in personam* has been assumed, where according to the *lex situs*, the party sued was incapable of making the contract sued upon, and where therefore, the Court of the country in which the property indirectly to be affected lay would treat the English decree in the language of Lord Campbell in *Norris* v. *Chambres* as 'brutum fulmen!".

In the case of *Waterhouse* v. *Stansfield*, (1851) 9 Hare 234; 66 E.R. 489, at page 259 Sir G. J. Turner, V.C. stated:—

> "When the law of a foreign country places a restraint upon the alienation of the property of a debtor situated in such country, an equity arising here on a contract entered into in respect of such property cannot be enforced against the *lex loci rei sitae*."

This appears to me exactly what has happened in the present case, viz, the Siamese law has placed a restraint on the creation of charges on pratanabats.

Clearly, the charge on the pratanabats was, in the absence of sanction, contrary to the *lex situs*.

On behalf of Mr. McGregor, I am asked to recognise as valid something which never was so according to the laws of Siam. To quote Lord Moulton (*supra*), "Our ideas of land tenure may not agree with theirs, but we are bound to accept and act loyally up to the laws as to land which obtain there."

The cases to which I have referred are to some extent conflicting.

In *Ex parte Pollard (supra)* it was said that the English Courts "act upon their own rules and are not influenced by any consideration of what the effect of such contract might be in the country where the lands are situate."

In *British South Africa Company* v. *De Beers Consolidated Mines Ltd., (supra)* it was said that the Court regards English, not foreign law, and if there is an equity, the Court will enforce it although the equity may be one not recognised by the *lex loci rei sitae*.

In both these cases, however, and in that of *Ex parte Holthausen*, (1874) 9 Ch. App. 722, it must be remembered that the charges were such as would be valid according to English law, and had not been created in contravention of the *lex situs*.

As against these cases, in *Bank of Africa Ltd.*, v. *Cohen (supra)* we find this dictum:—

> "Where, as we find to be the case here, the *lex situs* declares an instrument of suretyship intended to operate upon real estate to be void because of an incapacity of one of the parties, except upon certain conditions which have not been fulfilled, to bind herself by such an instrument, it is the duty of this forum to respect the *lex situs*, and to treat the instrument as of no validity against that party..... In none of these cases have our Courts given effect to a contractual or equitable right *in personam* which the *lex rei sitae* would treat as incapable of creation."

The circumstances in the last named case seem to me to approach most nearly those in the present issue. True, there, it was a question of a married woman's personal capacity to make a contract with regard to land, but the other

principles involved were much the same, especially as to the validity of an instrument, viz. the charge on the pratanabats.

The charge on the pratanabats was "incapable of creation" except under conditions which have not been fulfilled, viz, the obtaining of the sanction. I know of no equitable doctrine which will go to the length of recognizing as valid, something which was invalid *ab initio*.

The creditor company when accepting the debenture, should have been satisfied that the necessary formalities required by Siamese law had been complied with. If they accepted a charge which so far as the pratanabats were concerned, was a nullity according to the *lex situs*, I do not consider it is within the province of this Court to attempt to override the *lex situs*.

Following the case of *Kent Coast Railway* v. *London Chatham and Dover Railway Co., (supra)*, I hold that the charge on the pratanabats never existed. I therefore fail to see how I can be asked to give effect to it.

I make the following orders upon the two matters submitted:—

(a) On the liquidation of Huey Yet Tin Dredging Ltd., Bun Tin Lum Co., Ltd., was not entitled to enforce in or through the Courts of the Federated Malay States an equitable charge against the pratanabats.

(b) The proceeds of sale of the property of Huey Yet Tin Dredging Ltd., other than that portion thereof apportionable to the movable property (which it is admitted was properly charged by the debenture) are to be applied in satisfaction of the claims of the creditors generally.

With regard to the costs of this summons; in view of the complexity and importance of the issue, and the uncertainty of the law—no similar point having arisen in any of the cases to which reference has been made—which made it essential that one or other party should apply to this Court for directions, by consent of both parties through their counsel, I assess the costs at $500: $250.00 to be paid to each party.

Under Section 192 of the Companies Enactment. I order that these costs be paid by the liquidator out of the assets of Huey Yet Tin Dredging Limited.

Order accordingly.

[ORIGINAL CIVIL JURISDICTION]

MUDIE, J.

September 25, 1934.

IN RE S.M.R.M. SITHAMPARAM CHETTIAR *EX PARTE* SUNDRA SINGH.

[NEGRI SEMBILAN BANKRUPTCY No. 9 of 1934]

Bankruptcy — Bankruptcy Notice — "Final Decree" — The Bankruptcy Enactment, 1912, section 4 (i) (i) — The Civil Procedure Code, 1918, section 246.

Under Sub-section (i) (i) of section 4 of the Bankruptcy Enactment, 1912, the creditor who issues a bankruptcy notice must be in a position to issue execution on the judgment and consequently, when the decree has been made more than one year previously, the creditor is not entitled to issue a bankruptcy notice against the judgment-debtor, unless he has obtained leave from the Court, under section 246 of the Civil Procedure Code, 1918, to issue execution on the decree.

S. M. Sharma for the creditor.

F. A. P. Wright for the debtor.

Cur. Ad. Vult.

MUDIE, J.—This is a motion to set aside a Bankruptcy Notice which was issued on the 2nd day of August, 1934, on two grounds.

The first is that, when the respondent applied for the issue of the Notice, he did not produce to the Registrar an office copy of the judgment on which the notice was founded, and thereby failed to comply with Rule 91 of the Bankruptcy Rules, which reads as follows:—

> "A creditor desirous that a bankruptcy notice may be issued shall produce to the Registrar an office copy of the judgment on which the notice is founded and file the notice together with a request for issue which shall be in Form No. 4 in the Appendix with such variations as circumstances may require. The creditor shall at the same time lodge with the Registrar two copies of the bankruptcy notice to be sealed and issued for service and a copy for transmission to the Official Assignee which copy the Registrar shall forthwith send by post or otherwise to the Official Assignee."

It is contended that failure to comply with the Rule renders the Notice bad.

A Bankruptcy Notice, founded on this same judgment, was issued by the respondent on the 2nd of May, 1934, and served on the debtor. It was set aside on the application of the debtor on the ground that the amount stated to be due in the Notice was not correct.

When that Notice was issued an office copy was produced to the Registrar and filed in Court with the request.

The debtor then applied for the issue of a fresh Notice, which was issued without requiring an office copy of the judgment to be produced a second time.

The object of the Rule is that the Registrar may be satisfied that the conditions requisite for the issue of a Bankruptcy Notice obtain. As the Registrar was satisfied when the office copy was produced on the first application, I am of opinion that the Rule has been sufficiently complied with.

Even if it has not been complied with, it is clear that the debtor has not been prejudiced in the slightest degree, and that the proceeding is protected by section 122 of the Bankruptcy Enactment, 1912, which reads as follows:—